

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JAVIER DÍAZ-CASTRO (4),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO. 16-1044 (GAG)

ORDER

Presently before the Court is Defendant Javier A. Díaz-Castro's motion for reconsideration asking the Court to issue a certificate of appealability. (Docket No. 6.) The motion is hereby **DENIED**.

The motion challenges on appeal the imposition of mandatory minimum sentences of ten years, imposed concurrently for the two drug counts, followed by consecutive mandatory minimum sentences of five and twenty-five years for distinctively separate offenses under 18 U.S.C. § 924(c). Díaz-Castro argues that his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment. This matter has been considered and rejected by the United States Supreme Court and Courts of Appeals, including the First Circuit. See Harmelin v. Michigan, 501 U.S. 957 (1991) (holding that congressional mandatory minimum sentences are not unusual under the Eighth Amendment); United States v. Polk, 546 F.3d 74 (1st Cir. 2008); see also United States v. Reingold, 731 F.3d 204 (2d Cir. 2013); United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006); United States v. Kratsas, 45 F.3d 63, 68 (4th Cir. 1995); United States v. Hughes, 632 F.3d 956 (6th Cir. 2011); United States v. Ousley, 698 F.3d 972 (7th Cir. 2012); Simmons v. Iowa, 28 F.3d 1478 (8th Cir. 1994); United States v. Gomez, 472

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1 F.3d 671 (9th Cir. 2006); United States v. Angelos, 433 F.3d 738 (10th Cir. 2006); United States
2 v. Murillo-Guzman, 845 F.2d 314 (11th Cir. 1988).

3 The fact that the undersigned, as stated during sentencing, understands that a sentence
4 less than the 40 years imposed would have been more than appropriate for this defendant, fares
5 him no better. The Court is obliged to follow Congress's constitutionally valid mandate, whether
6 in agreement or not.

7 Also, the Court notes that this case cannot simply be characterized, as Díaz-Castro
8 suggests, as a drug case with a high mandatory minimum. At the time of the commission of the
9 offenses at bar, Díaz-Castro was a Puerto Rico police officer whose sworn duty was to "serve
10 and protect" the citizenry of this United States jurisdiction. He chose to violate his sacrosanct
11 oath, not only by participating in narcotics transactions, but also by using his firearm in
12 furtherance of such transactions. Hence, he is not an individual who deserves pity, even were the
13 Court not bound by the addition of his three minimum consecutive sentences. Regardless of the
14 statutory minimums, the Court would have imposed a severe sentence under 18 U.S.C. §
15 3553(a), which, though less severe than 40 years, would not have been the slap on the wrist that
16 he would now like it to be.

17 Notwithstanding the above, the undersigned alludes to his opinion in United States v.
18 Amaro Santiago, 998 F. Supp. 2d 1 (D.P.R. 2014). The defendant in that case was convicted and
19 sentenced as a result of the same FBI operative as Díaz-Castro, to wit, "Operation Guardshack."
20 Said defendant, like Díaz-Castro, received a mandatory minimum sentence of 10 years on a drug
21 count, followed by a consecutive five year mandatory sentence on a weapons count. While the
22 Court was unable to sentence him below the congressionally-mandated penalty, or to fashion any
23 other remedy, the undersigned noted the following constitutional conundrum:

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1 Amaro, by virtue of his birth in the Commonwealth on September
2 1, 1972 has always been a United States citizen. Notwithstanding,
3 Amaro, as well as more than 3.5 million other United States
4 citizens residing in Puerto Rico, have historically lived under a
5 system of federal laws in which the constitutional principle of
6 consent of the governed is a fallacy. This is so because the People
7 of Puerto Rico have never been able, as residents of the territory
8 and then the Commonwealth, to vote for our Nation's executive
9 and congressional officers, who, in turn, enact and execute its laws.
10 Neither Amaro, nor his lineage have participated through elected
11 representatives in the process of enacting the drug and weapon
12 statutes under which he now stands convicted, contrary to the
13 residents of the fifty states. The fact that Amaro is now a federal
convict does not affect this predicament . . .

14 The future status of the Commonwealth is a question for the
15 Congress and the People of Puerto Rico to decide, and not this
16 court. However, I concur with Judge Cassellas that the People of
17 Puerto Rico and the political branches in our Nation's Capital
18 should 'urgently review the relationship in order to provide for
19 greater participation and a more specific mechanism of consent by
20 the People of Puerto Rico to the applicability of federal laws in the
21 Commonwealth.' Until such time, the Federal District Court in
22 Puerto Rico will continue to be part of a constitutionally valid, yet
23 flawed system of American Government.

24 United States v. Amaro Santiago, 998 F. Supp. 2d at 3-4. (citations omitted).

15 This very predicament applies to the Díaz-Castro case. While the undersigned is
16 powerless to craft any remedy, as a matter of principle he must vehemently denounce the same
17 again. It is a throwback to colonial times when the British crown taxed and governed its colonies
18 without representation, and also took away from the citizenry in America many of the sacred
19 rights which are today enshrined in our Constitution. Nonetheless, for the reasons described
20 above, Díaz-Castro's motion for reconsideration is without merit and it is hereby **DENIED**.

21 /s/ Gustavo A. Gelpi
22 GUSTAVO A. GELPI
23 United States District Judge